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IN THE

Supreme Court of the United States

ERIC MICHAEL CLARK,

Petitioner,

v.

THE STATE OF ARIZONA,

Respondent.

On Writ of Certiorari to the Arizona Court of Appeals

BRIEF OF THE AMERICAN ASSOCIATION ON MENTAL RETARDATION, THE ARC OF THE UNITED STATES, THE NATIONAL DISABILITY RIGHTS NETWORK, AND THE BAZELON CENTER FOR MENTAL HEALTH LAW, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI* [1]

Amici are national organizations of mental disability professionals and citizens (more fully described in the Appendix) with longstanding concerns about constitutional and statutory protections for people with mental disabilities in the criminal justice system.

[1] This brief was written entirely by counsel for *amici*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. All parties have given written consent to the filing of this brief.

SUMMARY OF ARGUMENT

It is now clearly established that the vast majority of people with mental retardation, developmental disabilities, or mental illness do not engage in criminal behavior. They live peacefully and productively in their communities. But when someone with a serious mental disability *is* charged with a criminal offense, the disability is very frequently relevant to the question of the individual's personal culpability.

Anglo-American legal tradition has long acknowledged the relevance of such disabilities to criminal cases. Although the formulations have varied over time, both courts and legislatures have recognized a disability-based defense. Most of the reported cases involve defendants with mental illness, but every formulation of the defense also encompasses individuals who have mental retardation.

The strength and durability of this tradition mean that its core principle is reflected in the Due Process Clause. While the States have considerable latitude in shaping their criminal laws, they must offer a defendant a meaningful opportunity to demonstrate the relevance of mental disability to the criminal charge. Failure to afford that opportunity is tantamount to transforming such crimes into strict liability offenses for these defendants.

States can satisfy the requirements of Due Process in more than one way. But, at a minimum, they must consider mental disability evidence offered by the defense to rebut any presumption about *mens rea*, and must provide a meaningful opportunity to establish the disability's relevance to the defendant's personal culpability.

ARGUMENT

I. ANGLO-AMERICAN LEGAL TRADITION RECOGNIZES THAT MENTAL LIMITATIONS CAN AFFECT AN INDIVIDUAL'S CULPABILITY FOR CRIMINAL ACTS.

A. Mental Disability Has Traditionally Occupied A Central Role In Assessing A Defendant's Criminal Responsibility.

The relationship between mental disability and criminal culpability has been acknowledged since days of antiquity,[2] and in a variety of formulations was accepted by both canonical and civil law into the Middle Ages.[3] The one major interruption in the acceptance of the exculpatory significance of mental disability occurred during the period of society's focus on witchcraft.[4] The sentiment against punishing per-

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[2] Plato noted that crimes could be committed "in a state of madness or when affected by disease, or under the influence of extreme old age, or in a fit of childish wantonness, himself no better than a child. And if this be made evident to the judges elected to try the cause, on the appeal of the criminal or his advocate, and he be judged to have been in this state when he committed the offence, he shall simply pay for the hurt which he may have done to another; but he shall be exempt from other penalties, unless he have slain some one, and have on his hands the stain of blood. And in that case he shall go to another land and country, and there dwell for a year . . . ." Plato, *Laws* 248 (B. Jowett trans., 3d ed. 1892). *See* Trevor J. Saunders, *Plato's Penal Code: Tradition, Controversy, and Reform in Greek Penology* 217 (1991). (Plato was not always so charitable, from a modern perspective, to people with disabilities. *See Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).)

[3] "In the matter of criminal responsibility, both ecclesiastical and secular courts routinely exonerated defendants judged to be insane or mentally retarded." Daniel N. Robinson, *Wild Beasts and Idle Humours: The Insanity Defense from Antiquity to the Present* 71 (1996); *see also* Naomi D. Hurnard, *The King's Pardon for Homicide Before A.D. 1307*, at 159-60 (1969).

[4] Robinson, *supra* note 3, at 74-75 ("Indeed, the very theory of witchcraft effectively denied defendants access to the insanity defense, though the defense was otherwise available.").

sons whose acts were occasioned or substantially affected by mental disability became more securely settled with the rejection of the notion that mental disability resulted from demonic possession, and with the growing recognition of mental illness as a medical phenomenon.[5]

The implementation of a complete defense based on mental disability has been controversial over time,[6] and remains so today.[7] The fact that it has endured periodic assaults is testament, not to its fragility, but rather to the enduring character of its basic principle. Whether the conceptualization of an "insane" defendant was expressed in terms of analogy to a

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[5] *See generally* Nigel Walker, *Crime and Insanity in England: Volume One—The Historical Perspective* (1968); Roy Porter, *Mind-Forg'd Manacles: A History of Madness in England from the Restoration to the Regency* (1987); Joel Peter Eigen, *Witnessing Insanity: Madness and Mad-Doctors in the English Court* (1995). One historian, however, has suggested that while legal recognition of insanity as a defense developed earlier, the phenomenon of medicalization and public acceptance of insanity as a *medical* phenomenon gained widespread acceptance somewhat later than the Victorian period. Roger Smith, *The Boundary Between Insanity and Criminal Responsibility in Nineteenth-Century England*, in *Madhouses and Mad-Doctors and Madmen: The Social History of Psychiatry in the Victorian Era* 363, 364 (Andrew Scull ed., 1981).

[6] *See, e.g.*, Charles E. Rosenberg, *The Trial of the Assassin Guiteau: Psychiatry and Law in the Gilded Age* 53-56 (1968) (noting that popular debate during the trial of President Garfield's assassin sometimes referred to "the insanity dodge"). *See generally* Mary Ann Jimenez, *Changing Faces of Madness: Early American Attitudes and Treatment of the Insane* (1987); Norman Dain, *Concepts of Insanity in the United States 1789-1865*, at 43-52 (1964).

[7] Henry J. Steadman, Margaret A. McGreevy et al., *Before and After Hinckley: Evaluating Insanity Defense Reform* 1-10 (1993). It should be noted that some of the same public skepticism extends to other legal issues involving individuals with mental disability, notably incompetence to stand trial. *See, e.g.*, Henry J. Steadman, *Beating a Rap?: Defendants Found Incompetent to Stand Trial* 4-6 (1979).

"wild beast,"[8] or inquiry whether an individual had the mental capacity to perform rudimentary tasks like "counting twenty pence,"[9] whether the individual could distinguish right from wrong,[10] whether he had the capacity to control his behavior in the face of an irresistible impulse,[11] or whether his actions were the "product" of mental disability,[12] there has remained in our law a core belief that some defendants are so affected by mental disability that it would be fundamentally unjust to convict and punish them.

The inquiry into the antecedents that constitute our legal traditions encompasses the full scope of Anglo-American legal history. But in interpreting the Due Process Clause, the understanding in the mid-Nineteenth Century carries particular significance because of the light it may shed on the perspectives in this country at the time the Fourteenth Amendment was written and ratified. It is clear that American medical and legal professionals were generally conscious

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[8] See, for example, Mr. Justice Tracy's jury instruction in *Rex v. Arnold*, 16 S. Tr. 695, 764-65 (H.L. 1724). *See generally* Anthony Michael Platt & Bernard L. Diamond, *The Origins and Development of the "Wild Beast" Concept of Mental Illness and its Relation to Theories of Criminal Responsibility*, 1 J. Hist. Behav. Sci. 355 (1965).

[9] *See, e.g.*, Anthony Fitz-herbert, *The New Natura Brevium of The Most Reverend Judge, Mr. Anthony Fitz-herbert* 532 (rev. & corrected ed. 1666). *See* Henry Weihofen, *Mental Disorder as a Criminal Defense* 53-54 n.6 (1954) (suggesting that while it was discussed in terms of criminal responsibility, the example was intended as a diagnostic description of idiocy rather than a precise formula for a criminal responsibility).

[10] *M'Naghten's Case*, 8 Eng. Rep. 718 (H.L. 1843). *See generally* Richard Moran, *Right From Wrong: The Insanity Defense of Daniel McNaughtan* (1981).

[11] *See, e.g., Parsons v. State*, 2 So. 854, 865 (Ala. 1887); *Regina v. Oxford*, 173 Eng. Rep. 941, 950 (H.L. 1840).

[12] *See, e.g., State v. Jones*, 50 N.H. 369, 382 (1871); *State v. Pike*, 49 N.H. 399, 408 (1870); *Durham v. United States*, 214 F.2d 862, 875 (D.C. Cir. 1954).

of the issue, and that there was widespread awareness of the *M'Naghten* case, albeit with spirited debate about its adequacy as a legal test.[13] The most widely noted American publication on the subject was Isaac Ray's *Treatise on the Medical Jurisprudence of Insanity*,[14] later editions of which criticized the *M'Naghten* test as too narrow in scope.[15]

Debates on the scope and implementation of the insanity defense continued into the Twentieth Century.[16] While there

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[13] *See, e.g.*, Rosenberg, *supra* note 6, at 102-03. The first use of *M'Naghten* by an American appellate court appears to be Chief Justice Shaw's opinion in *Commonwealth v. Rogers*, 48 Mass. (7 Met.) 500, 502 (1844). *See generally* Anthony Platt & Bernard L. Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 Cal. L. Rev. 1227 (1966) (use of the right-and-wrong test in American courts predated *M'Naghten*).

[14] Isaac Ray, *A Treatise on the Medical Jurisprudence of Insanity* (reprint 1962) (1st ed. 1838). First published in 1838, the treatise had been cited extensively in the *M'Naghten* trial. Bernard L. Diamond, *Isaac Ray and the Trial of Daniel M'Naghten*, 112 Am. J. Psychiatry 651 (1956). Ray's treatise was in its fourth edition (1860) at the time of the 39th Congress.

[15] Ray, *supra* note 14, app. I, at 343-50 (5th ed. 1871). Other American medical authorities of the era agreed. *See generally*, E.C. Spitzka, *Insanity: Its Classification, Diagnosis and Treatment* 23 (reprint 1973) (1887) ("that cannot be sanity in law which is insanity in science").

[16] There were isolated, ultimately unsuccessful efforts to abolish the defense early in the last century. Those statutory efforts were declared unconstitutional by state courts. *See State v. Strasburg*, 110 P. 1020 (Wash. 1910); *id.* at 1027 (Rudkin, C.J., concurring) ("There is little analogy between [a nondisabled defendant's mistake of fact] and *the idiot, the imbecile, or the person who is insane* to the degree defined by our statute. It will be conceded that the Legislature has a broad discretion in defining and prescribing punishment for crime, but, broad and pervading as the police power is, it is not without constitutional limitations and restraints, *and we can scarcely conceive of a valid penal law which would punish a man for the commission of an act which the utmost care and circumspection on his part would not enable him to avoid.*") (emphasis

were isolated efforts at the state level to abolish the defense,[17] and unsuccessful efforts at the federal level in the 1980s,[18] it cannot be disputed that some form of recognition that mental disability may undermine or diminish criminal liability is a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *See Patterson v. New York*, 432 U.S. 197, 202 (1977) (internal citations omitted).[19]

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added); *Sinclair v. State*, 132 So. 581 (Miss. 1931); *id.* at 584 (Ethridge, J., concurring) ("So closely has the idea of insanity as a defense to crime been woven into the criminal jurisprudence of English speaking countries that it has become a part of the fundamental laws thereof.").

[17] *See* Idaho Code Ann. § 18-207 (1982); Kan. Stat. Ann. § 22-32-20 (1996); Mont. Code Ann. § 46-14-101 (1979); Utah Code Ann. § 76-2-305 (1983). *But see Finger v. State*, 27 P.3d 66, 84 (Nev. 2001) ("[L]egal insanity is a well-established and fundamental principle of the law of the United States. It is therefore protected by the Due Process Clauses of both the United States and Nevada Constitutions.").

[18] *But cf.* Insanity Defense Reform Act of 1984, 18 U.S.C. § 17 (1984) (changing the test for insanity but preserving the defense).

[19] The fact that the insanity defense (or a successful *mens rea* defense) is controversial does not resolve the Due Process inquiry. Other criminal law protections that this Court has recognized as fundamental are also potentially controversial, at least after a result unfavorable to the prosecution in high-profile cases (for example, the privilege against self-incrimination, state-provided counsel for indigents, proof beyond a reasonable doubt at trial, suppression of the fruits of unreasonable searches or seizures, or the prohibition on double jeopardy).

Interpretations of both the Due Process Clause and the Eighth Amendment include examination of our legal traditions, but do so in somewhat different ways. Eighth Amendment analysis includes both inquiries into historical antecedents, *e.g.*, *Ford v. Wainwright*, 477 U.S. 399, 406-08 (1986), and into contemporary social consensus, *Roper v. Simmons*, 543 U.S. __, 125 S. Ct. 1183, 1192-94 (2005). As a result, Eighth Amendment examination of legislative enactments is a means of gauging the existence and evolution of contemporary standards of decency. By contrast, the "rooted in the traditions and conscience" inquiry in Due Process analysis looks to the centrality and continuity of traditional protections.

B. The Reduced Culpability Of Individuals With Mental Retardation Has Long Been Recognized.

Although the cases have focused on defendants with mental illness, there has also been recognition, at least in theory, that the same principle applies to individuals whose impairment results from mental retardation. At common law, particularly with regard to issues like conservatorship and property, distinctions were drawn between people with mental illness and people with mental retardation. *See Heller v. Doe*, 509 U.S. 312, 326 (1993). These appear to have derived, at least in part, from different expectations about whether an individual might become mentally competent at some time in the future. *See* William Blackstone, 1 *Commentaries* *296. Categorical distinctions of this type, however, were not generally made part of the criminal law.

None of the early formulations of the insanity defense excluded people whose impairment we would now identify as mental retardation. Fitz-herbert's "count twenty pence" test was clearly focused on intellectual impairment. Blackstone counseled that "idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself." William Blackstone, 4 *Commentaries* *24. The *M'Naghten* test's reference to mental disease *or defect* expressly included individuals with mental retardation. Other formulations, including the Model Penal Code and the Insanity Defense Reform Act of 1984, have also adopted the "defect" category as a parallel to mental disease.[20]

Cooper v. Oklahoma, 517 U.S. 348, 356-63 (1996). Thus, while sharp public controversy may be relevant to Eighth Amendment analysis, it is less so for Due Process.

[20] Model Penal Code § 4.02 (official drft. & rev. cmts. 1985); Insanity Defense Reform Act of 1984, 18 U.S.C. § 17 (1984). *See also McDonald v. United States*, 312 F.2d 847, 851 (D.C. Cir. 1962) (applying the "product" test of *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), to

Even in the era of our history that featured the most virulent antipathy toward people with mental retardation, there was some recognition of their reduced moral culpability. When leading authorities in the field of mental retardation were sounding the alarm of an imagined threat posed to society,[21] many also acknowledged the effect of the disability on an individual's moral responsibility.[22]

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defendants with mental retardation). The fact that the scope of the categories of "idiots," "imbeciles," "morons," and other archaic (and now offensive) terms may not be precisely coextensive with the modern definition of mental retardation, *see Penry v. Lynaugh*, 492 U.S. 302, 332-33 (1989), does not reduce the relevance of these early cases to the constitutional questions of whether our legal traditions recognize the relevance of a defendant's disability to culpability, and whether there is a right to present evidence about the disability to rebut a presumption of a culpable mental state.

[21] *See, e.g.*, James W. Trent, Jr., *Inventing the Feeble Mind: A History of Mental Retardation in the United States* 131-83 (1994); Leila Zenderland, *Measuring Minds: Henry Herbert Goddard and the Origins of American Intelligence Testing* (1998).

[22] *See, e.g.*, A.F. Tredgold, *Mental Deficiency (Amentia)* 306 (1st ed. 1908) ("I am quite certain that in persons suffering from amentia a diminished power of control is so commonly present, and such an essential part of their mental condition, that a grave injustice may be done if this be not taken into account."); V.V. Anderson, *Feeblemindedness as Seen in Court*, 1 Mental Hygiene 260, 263 (1917) ("Not only were they incapable of measuring up to the educational or economic standards met by their normal fellows, but they were equally incapable of conforming to the standards of conduct of the community in which they lived."); Wm. Ray Griffin, *Criminal Responsibility of the Mentally Deficient*, 20 Southern Med. J. 918, 919 (1927) ("[M]orons and high grade imbeciles and the lower types of defectives are only imitators and act impulsively, doing the thing that appeals to them most strongly, or that they are urged or persuaded to do. They are unable to take the problem and weigh it from the standpoint of right and wrong and act accordingly."); George L. Wallace, *Are the Feebleminded Criminals?*, 13 Mental Hygiene 93, 96 (1929) ("There is little doubt that most of the feebleminded who become criminals do so by accident rather than by intention."). See also Herbert C. Parsons's (exquisitely titled) *The Learned Judge and the Mental*

While the insanity defense, at least in modern times, has been used less frequently by defendants with mental retardation than in cases involving defendants with mental illness,[23] it remains at least theoretically available.[24] But its infrequent use in mental retardation cases emphasizes the crucial importance of recognizing the right of defendants with mental retardation to offer rebuttal evidence on the issue of *mens rea*.

Defective Meet—What Then?, 12 Mental Hygiene 25, 30 (1928) ("Given a crime sufficiently atrocious and a popular resentment sufficiently inflamed, and the measurings of mental responsibility go to discard.").

The most widely cited, and to modern eyes perhaps the most notorious, authority of the alarmist period was Henry H. Goddard. *See, e.g.*, Henry H. Goddard, *The Kallikak Family: A Study in the Heredity of Feeble-mindedness* (1912). While Goddard campaigned tirelessly for eugenic sterilization and segregation of people with mental retardation, he also acknowledged that they often lacked responsibility for their criminal acts. *See, e.g.*, Henry H. Goddard, *A Brief Report on Two Cases of Criminal Imbecility*, 19 J. Psycho-Asthenics 31, 33 (1914) ("He may be able to say that it is wrong as a mere matter of verbal repetition, repeating what he had heard others say, but as for having a realizing sense of the wrongfulness of the deed, I am satisfied that no imbecile or moron of his grade has any such knowledge.").

[23] It is not completely clear why this is true. Although *amici* have found no relevant statistics, it is conceivable that there may be somewhat more frequent diversion from prosecution for some defendants who have mental retardation, particularly where the impairment is manifestly severe. It may also be that some defense counsel fail to detect or correctly identify their clients' mental impairment. And the fact that the defense is labeled "insanity," a term connoting mental illness, may prove to be a barrier, in some way, to obtaining recognition of its applicability to a defendant with mental retardation.

[24] *See, e.g., In re Ramon M.*, 584 P.2d 524, 529-30 (Cal. 1978). Over the years, there have been a few cases in which courts precluded defendants who appear to have had mental retardation from raising the defense. See James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 432-41 (1985), for a fuller discussion of these early cases.

II. DUE PROCESS REQUIRES STATES TO RECOGNIZE THE RELEVANCE OF MENTAL DISABILITY TO THE ASSESSMENT OF CRIMINAL GUILT.

A. The Constitution Imposes Modest Limits On The States' Wide Latitude In The Area Of Criminal Justice.

Out of respect for the proper role of the States in our federal system, this Court has allowed them considerable latitude in defining crimes and enacting procedures for their adjudication. *Martin v. Ohio*, 480 U.S. 228, 232 (1987); *Patterson*, 432 U.S. at 201 ("[W]e should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States."). This leeway granted to the States reaches into such areas as evidentiary rules, *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983), allocating burdens of persuasion, *Medina v. California*, 505 U.S. 437 (1992), and identifying the acts they choose to criminalize and the elements of those crimes, *Montana v. Egelhoff*, 518 U.S. 37, 57 (1996) (Ginsburg, J., concurring in the judgment).

Amici recognize that one of the areas in which the Court has shown deference to state legislative judgments involves the treatment of individuals with mental disabilities. In the criminal context, the Court has allowed a State to impose a heavy burden of persuasion on a criminal defendant pleading insanity, and refrained from requiring one particular formulation of the insanity defense on all the States. *Leland v. Oregon*, 343 U.S. 790, 798-801 (1952).[25] On occasion,

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[25] In the doctrinally distinct (but practically related) area of competence, the Court also allowed a State to impose the burden of persuasion on the defendant in establishing incompetence to stand trial. *Medina v. California*, 505 U.S. 437 (1992). *But see Cooper v. Oklahoma*, 517 U.S. 348 (1996) (unconstitutional to impose burden on defendant at the elevated level of "clear and convincing evidence").

individual Justices of this Court have noted the question of whether the insanity defense is constitutionally required. *See, e.g., Foucha v. Louisiana*, 504 U.S. 71, 97-98 (1992) (Kennedy, J., dissenting) (observing that several States had abolished the defense). In addition, States have been afforded considerable latitude in designing a system of civil commitment for those acquitted by reason of insanity. *See generally Jones v. United States*, 463 U.S. 354 (1983).

However, the freedom of States to shape their criminal laws is not limitless. The Constitution does impose some limits on both the substantive and procedural aspects of state criminal laws. Some of these limitations derive from the relatively explicit provisions of the Bill of Rights. Others are grounded in the more general wording of the Due Process Clause of the Fourteenth Amendment and the Punishments Clause of the Eighth Amendment. When interpreting these potentially more expansive texts, the Court has grounded (and thus limited) its supervision of the States by looking to the historical experience of Anglo-American legal tradition and to basic principles of fundamental fairness. *Cooper v. Oklahoma*, 517 U.S. 348, 355 (1996).

Particularly in interpreting the Due Process Clause, historical tradition has a prominent position. In evaluating procedural protections, the Court has only intervened when the State's law "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson*, 432 U.S. at 202 (internal citations omitted). Principles of federalism require a similar focus on, and examination of, our legal traditions and experience in evaluating novel alterations of a State's substantive criminal laws.

When state laws alter the traditional approaches to the culpability of defendants with serious mental disabilities, historical guides can be identified in two separate lines of doctrinal development. The first is the history of addressing

the culpability of defendants with such disabilities. The second line of development is the persistence of our commitment to the principle that a finding of guilt for a serious crime cannot be based on strict liability and must be supported by a conclusive demonstration of personal culpability.

B. Strict Liability For Serious Offenses Is Strongly Disfavored.

The core principle of grounding guilt in an individual defendant's personal culpability is a broad and durable foundation of our criminal law. More than half a century ago, Justice Jackson articulated the fundamental commitment to that principle:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. . . . Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will."

Morissette v. United States, 342 U.S. 246, 250-51 (1952) (footnotes omitted) (quoting William Blackstone, 4 *Commentaries* *21).

This bedrock principle retains its force, even with the enactment of modern regulatory laws that sometimes impose penalties without proof of individual culpability. The creation of offenses, often in the borderland between criminal law and administrative law, *see Morissette*, 343 U.S. at 252-54, does not erode the central importance of individual guilt in traditional crimes. First, strict liability offenses are most frequently limited to violations of law that are punished at

relatively modest levels.[26] In addition, they often involve conduct of an actor who is capable of knowing and has reason to know of the risk to the public posed by his conduct. *See, e.g., Staples v. United States*, 511 U.S. 600, 607 (1994); *United States v. Dotterweich*, 320 U.S. 277, 281 (1943). These factors contribute to what Chief Justice Burger described as "their generally disfavored status." *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978).

The generally cabined exception, found in regulatory offenses, has left intact the basic principle for the most serious crimes: personal culpability remains a central requirement. As Justice Jackson explained:

> Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. . . . The unanimity with which [the courts] have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms

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[26] For example, the Model Penal Code limits strict liability offenses to those punishable by a fine. "Crime does and should mean condemnation and no court should have to pass that judgment unless it can declare that the defendant's act was culpable. This is too fundamental to be compromised. The law goes far enough if it permits the imposition of a monetary penalty in cases where strict liability has been imposed." Model Penal Code § 2.05 cmt. 1, at 283 (official drft. & rev. cmts. 1985) (footnote omitted). *See also Staples v. United States*, 511 U.S. 600, 616-19 (1994). In most modern legislation, strict liability offenses carry "a relatively light penalty—generally of the misdemeanor variety." Wayne R. LaFave, *Criminal Law* 273 (4th ed. 2003).

> as "felonious intent," "criminal intent," "malice aforethought," "guilty knowledge," "fraudulent intent," "wilfulness," "*scienter*," to denote guilty knowledge, or "*mens rea*," to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought *to protect those who were not blameworthy in mind* from conviction of infamous common-law crimes.

Morissette, 342 U.S. at 251-52 (footnotes omitted) (emphasis added).

This longstanding tradition has guided this Court's efforts in cases like *Morissette* and *Staples* to interpret statutes where there is legislative ambiguity about the required *mens rea*. The fact that the Court has seldom had occasion to address the *constitutionality* of strict liability statutes results, in large part, from the fact that legislatures have generally been quite reluctant to impose liability without fault for traditional, major crimes that involve both public censure and heavy penalties.

But when a State seeks to impose its most severe criminal penalties on defendants whose culpability may have been substantially impaired by mental disability, serious Due Process questions must be addressed.[27]

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[27] The principal focus of the Court in this area has been the Due Process Clause of the Fourteenth Amendment. But convicting a defendant who has a substantial mental disability without affording opportunity to consider the possibly exculpatory implications of that disability also raises issues of cruel and unusual punishment under the Eighth Amendment. *Cf. Robinson v. California*, 370 U.S. 660, 661 (1962); *Lambert v. California*, 355 U.S. 225, 231 (Frankfurter, J., dissenting) (1957). Like the Due Process Clause, the Punishments Clause has a dual focus on historical practices and contemporary notions of fairness. *See, e.g., Ford v. Wainwright*, 477 U.S. 399, 406 (1986) ("In addition to considering the barbarous methods generally outlawed in the 18th century, . . . this Court takes into account objective evidence of contemporary values before determining whether a particular punishment comports with the funda-

C. Depriving Defendants Of An Opportunity To Demonstrate The Relevance Of Their Mental Disabilities To Criminal Guilt Constitutes Strict Liability.

The relevance of mental retardation and other serious mental disabilities to criminal culpability has been universally recognized. As this Court has observed, individuals with mental retardation "have a reduced ability to cope with and function in the everyday world." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442 (1985). While the vast majority of individuals with this intellectual impairment do not engage in criminal behavior, it is always relevant to assessing culpability when criminal conduct is charged. "[T]oday our society views mentally retarded offenders as categorically less culpable than the average criminal." *Atkins v. Virginia*, 536 U.S. 304, 316 (2002). *See also id.* at 318 ("Because of their impairments, . . . by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.").

Similarly, other serious developmental disabilities and mental illness are equally crucial to an understanding of conduct that violates the criminal law. *See Tennard v. Dretke*, 542 U.S. 274, __, 124 S. Ct. 2562, 2572 (2004) ("Evidence of significantly impaired intellectual functioning is obviously evidence that might serve as a basis for a sentence less than death.") (internal quotations omitted). *See generally* Stephen

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mental human dignity that the Amendment protects."); *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) ("The Eighth Amendment succinctly prohibits '[e]xcessive' sanctions. '. . . [I]t is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'") (internal citations omitted). While there are doctrinal differences in the interpretation of the two constitutional texts, *see supra* note 19, their common core principles suggest that either approach would yield similar analysis.

P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1564-65 (1998) (a majority of surveyed jurors found mental illness and extreme mental or emotional disturbance to be potentially persuasive mitigating circumstances); James R. Acker & Charles S. Lanier, *In Fairness and Mercy: Statutory Mitigating Factors in Capital Punishment Laws*, 30 Crim. L. Bull. 299, 317-19, 327-30 (1994) (extreme emotional disturbance and mental illness are among the mitigating factors most frequently specified by legislatures).

In both capital and noncapital cases, mental retardation and other mental disabilities can be essential considerations in assessing an individual's criminal culpability for two reasons. First is the obvious effect that such a disability can have on an individual's understanding of his conduct and the ability to control that conduct.

Second, individuals who have the disabilities did not voluntarily choose to be affected by them. While the etiology of mental retardation varies widely, and in a considerable number of cases cannot be identified with specificity, virtually no one who has the disability bears any responsibility for acquiring it. *See generally* AAMR, *Mental Retardation: Definition, Classification, and Systems of Supports* 123-37 (10th ed. 2002). Similarly, other developmental disabilities and major mental illnesses are seldom conditions that the affected individual has chosen or sought. *See generally* Michael Gelder, Dennis Gath et al., *Aetiology*, in *Oxford Textbook of Psychiatry* 74-104 (3d ed. 1996).[28]

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[28] This stands in sharp contrast to voluntary intoxication. *See Montana v. Egelhoff*, 518 U.S. 37, 57 (1996) (Ginsburg, J., concurring in the judgment); *id.* at 76 (Souter, J., dissenting). The individual's presumed responsibility for his own intoxication means that the exclusion of consideration of such evidence can be attributed to that morally culpable act. In addition, exclusion of intoxication evidence may be thought to have some deterrent effect. *See Egelhoff*, 518 U.S. at 49-50 (plurality opinion

Amici do not suggest that the presence of a mental disability will always be dispositive of cases involving serious criminal charges. Like evidence of mental illness offered in mitigation in a capital trial, rebuttal evidence of a defendant's mental disability on the question of *mens rea* will sometimes be persuasive and sometimes it will not. Some, perhaps many, defendants with mental retardation and other mental disabilities will, notwithstanding their disability, have formed the requisite mental state for the serious crime with which they are charged. When that proves to be true, they may be guilty of the crime for which they are prosecuted (and the only remaining relevance of their disability may be at sentencing). By contrast, when the legislature has decided that a particular crime requires a particular mental state, and where a defendant does not have that mental state, our traditions and shared sense of justice will not allow us to pretend that the mental state was present.

D. Defendants Are Entitled To An Opportunity To Present Relevant Mental Disability Evidence.

As noted earlier, this Court has allowed substantial latitude to the States in determining the shape of their criminal justice systems. The constitutional limitations that constrain that latitude in cases involving defendants with mental disabilities are relatively modest in scope, but crucial in practice. They

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per Scalia, J.). Reasonable minds can and do disagree about the moral calculus of excluding exculpatory consideration of voluntary intoxication. For example, in capital cases, voluntary intoxication is among the least persuasive of mitigators in the minds of jurors. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1565 (1998). *See generally* LaFave, *supra* note 26, at 471-85, and authorities cited therein. There is no comparable culpability in having mental retardation. *See generally* Paul H. Robinson, *Criminal Law* 273 (1997). Nor can exclusion of evidence of the effect of a defendant's disabling condition somehow create a disincentive to have the disability.

are addressed below, starting with the narrowest resolution of the instant case and proceeding to the broadest.[29]

1. The Constitution requires that evidence of mental limitations be considered in assessing a defendant's *mens rea.*

Where the legislature has established a particular mental state as a material element of a crime, and where the prosecution has offered evidence in support of its view that the defendant had that mental state, the defendant is entitled to present rebuttal evidence to show that he did not have that mental state.[30]

The opportunity to be heard and to present a defense is protected both by the procedural meaning of the Due Process Clause and the Sixth Amendment's guarantee of a fair trial. "That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on [an issue] . . . central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the

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[29] In the view of *amici*, this case can be resolved narrowly, granting Petitioner relief from the denial of the opportunity to present rebuttal evidence to the prosecution's inferential assertion of *mens rea*. If that is correct, it becomes unnecessary for this Court to address the broader constitutional issues presented in the Petition for Certiorari. *See Parker v. Los Angeles County*, 338 U.S. 327, 333 (1949) ("The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity."). However, since the broader issues are included in the Questions Presented, *amici* will offer their perspective on them briefly.

[30] The right to consideration of such evidence is particularly crucial when the charge involves what some States denominate as "specific intent" crimes, *see generally United States v. Bailey*, 444 U.S. 394, 405 (1980), and other States identify as "intentional" crimes, *see, e.g., State v. Bridgeforth*, 750 P.2d 3, 5 (Ariz. 1988). However, *amici* believe that the right to offer mental disability evidence on the issue of *mens rea* should be recognized for *all* defendants prosecuted for serious offenses.

basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986) (internal quotation omitted).

Evidence of the effect of mental disability on a defendant's conduct can be relevant in two distinct and equally important ways. The first category consists of cases in which the proffered evidence regarding a defendant's mental illness or mental retardation rebuts the prosecution's assertion by showing that the defendant did not harbor that mental state *because the mental disability rendered him incapable of forming it.* This is the category of cases that has most frequently been addressed by the courts.

The second category of cases involves a defendant whose disability may not have rendered him *incapable* of forming the requisite mental state, but where the proffered evidence provides *an alternative explanation* for behaviors that might otherwise be interpreted as incriminating by the trier of fact. While this category has been addressed less frequently by appellate decisions, it is equally vital. Triers of fact (both juries and judges) often interpret a defendant's behavior in the light of their expectation of how people normally behave in a given circumstance, or how they normally react to a particular event. In forming these interpretations, the triers of fact often evaluate a defendant's actions by what *they* would do if confronted by similar circumstances.

But a common feature of mental illness or mental retardation is that the individual who has that disability may not act or respond in the same way other individuals would. Individuals with mental illness and, in different ways, people with mental retardation may sometimes behave in an unexpected, seemingly illogical manner.[31] When that behavior is

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[31] *See* Johnny L. Matson & Virginia E. Fee, *Social Skills Difficulties Among Persons with Mental Retardation*, in *Handbook of Mental*

sufficiently bizarre, laypeople may, even without the assistance of expert testimony, identify it as a manifestation of the mental illness. Yet in other cases, its relation to a mental disability may be less apparent. Expert testimony may be crucial in assisting the trier of fact in determining whether the behavior under examination connotes the same mental state that it would if the actor were an individual who did not have the mental disability.[32]

In each category, the State can offer no valid justification for prohibiting the consideration of such evidence. The state legislature has chosen to make a particular mental state an indispensable element of the prosecution's case. Having done so, the State cannot then permit the prosecution to offer its own evidence while denying the trier of fact the opportunity to consider contrary relevant, probative evidence that, if believed, would demonstrate that a defendant did not have that mental state. The result of the Arizona rule is to permit

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Retardation 468-78 (Johnny L. Matson & James A. Mulick eds., 2d ed. 1991). The risk of misinterpreting perceptions, reactions, and behavior can be exacerbated when the individual has both mental retardation and mental illness. *See* Johannes Rojahn, Johnny L. Matson et al., *Relationships Between Psychiatric Conditions and Behavior Problems Among Adults with Mental Retardation*, 109 Am. J. Mental Retardation 21, 31 (2004).

[32] Evidentiary rules no longer limit expert testimony to information "not within the common knowledge of the average layman." *Compare Bridger v. Union Ry.*, 355 F.2d 382, 387 (6th Cir. 1966), *with* Fed. R. Evid. 702. *See generally Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993). *See also* Ariz. R. Evid. 702. Nonetheless, expert testimony can be crucially helpful when, in its absence, a trier of fact would be likely to misinterpret facts by relying on intuitions from common experience that may be misleading regarding a defendant with a mental disability. *See, e.g., United States v. Pino*, 606 F.2d 908, 919 (10th Cir. 1979) (psychiatric testimony that a person in shock would appear drunk). *See* Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence* 620-21 (3d ed. 2003); Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence Manual* § 13.02[2] (student 7th ed. 2005).

various other kinds of *non*disability rebuttal evidence regarding *mens rea* but to exclude mental disability evidence. This is, in essence, a form of discriminatory treatment that is unwarranted by any legitimate public policy.[33]

Refusal to permit consideration of a defendant's mental disability can transform serious crimes into *de facto* strict liability offenses for individuals whose mental functioning was substantially impaired. For example, such a rule would allow a finding that a defendant acted "knowingly" when his mental impairment rendered him incapable of "knowing" whatever the offense specified.[34]

The American Bar Association's position on this issue is persuasive. "Evidence, including expert testimony, concerning the defendant's mental condition at the time of the alleged offense which tends to show the defendant did or did not have the mental state required for the offense charged should be

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[33] A general desire to increase the rate of convictions cannot, of course, justify excluding exculpatory evidence for this one sub-class of defendants. (The State is free to change the required mental state for a crime, but such a change would apply to all defendants equally.) Similarly, a desire to incapacitate defendants with mental disabilities is insufficient justification for excluding exculpatory evidence. In most cases, a determination that the defendant did not possess the statute's required *mens rea* will not result in acquittal. Even if a defendant lacks the *mens rea* for a particular charged crime, they will generally remain convictable of lesser included offenses. Am. Bar Ass'n, *Standards for Criminal Justice* § 7-6.2 cmt. at 7-314 (adopted 1984). And if a defendant's disability is so severe that he or she lacks the *mens rea* for *any* offense, the State has other options. As in the case of defendants who successfully raise the insanity defense, States may seek their incapacitation under special commitment statutes. *See generally Jones v. United States*, 463 U.S. 354 (1983); Am. Bar Ass'n, *Standards for Criminal Justice* §§ 7-7.1 to 7-7.11 (adopted 1984).

[34] Lack of knowledge of commonly known facts is a characteristic of many criminal defendants who have mental retardation. *See Mentally Retarded Criminal Defendants*, *supra* note 24, at 431.

admissible." Am. Bar Ass'n, *Standards for Criminal Justice* § 7-6.2 (adopted 1984).[35] The Commentary notes that this Standard "incorporates a simple evidentiary principle based on a rule of 'logical relevance.' Except in strict liability cases, criminal adjudication always involves determining whether a defendant possessed the *mens rea* for an offense. Therefore, evidence, including properly qualified expert testimony, that tends to show a defendant did or did not have the mental state for a charged offense should be admissible." *Id.* cmt. at 7-313.

Exclusion of such relevant exculpatory evidence deprives a defendant who has a serious mental disability of the procedural protections of a fair trial, and also subjects that defendant to punishment that is the equivalent of strict liability—conviction and punishment of a serious offense without personal culpability. Thus, both the procedural and substantive meanings of the Due Process Clause are implicated.

2. Whether in terms of an insanity defense or in some other form, the States must provide a meaningful opportunity to demonstrate the relevance of a defendant's mental disability.

The most constitutionally challenging issue is the status of the insanity defense itself. The difficulty of the issue derives from the tension between two powerful constitutional principles. The first is this Court's practice of generally deferring to choices made by the States in the shaping of criminal liability under their own laws. But the second, of at least equal gravity, is the longstanding tradition in Anglo-American law of recognizing the potentially exculpatory effect of

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[35] *See also* Model Penal Code § 4.02(1) (official drft. & rev. cmts. 1985) ("Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of the offense.").

the fact that a defendant had a serious mental disability. As noted earlier, *amici* believe that this history constitutes a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *See Patterson*, 432 U.S. at 202.

While the core principle that mental disability may reduce a defendant's personal culpability so significantly that it requires acquittal has "deep roots in our common-law heritage," *see Medina*, 505 U.S. at 446, the precise contours of its implementation have varied over time, and from State to State. But those variations do not, and cannot, undermine the basic principle that has been recognized in our law for centuries.

How, then, is this basic principle to be enforced in the modern constitutional context?

One possible constitutional approach would identify the longest-standing and most widely-adopted formulation of the insanity defense as a *minimum constitutional floor*, below which the States would be prohibited from descending. The most obvious candidate for implementing such a constitutional rule would be the formulation in *M'Naghten*. Such a constitutional holding would permit States to experiment with the formulation (and procedural implementation) of the insanity defense, while requiring that they provide to defendants at least its minimum protections.

An alternative to that constitutional approach would be to focus on the functionality of a State's protection of defendants with serious mental disabilities, rather than on its form or wording. Such analysis would have two components.

The first part of this approach would begin with the traditions developed under Anglo-American law over time. If a State adopts a formulation of a mental disability defense grounded in our historical traditions, such as the basic *M'Naghten* test or that of the Model Penal Code, it would be

deemed to be protected by a *constitutional safe harbor*, protecting its substantive law from federal constitutional challenge.[36]

If, however, a State chooses to adopt a more restrictive formulation of the defense, or to abolish it altogether, a constitutional challenge might occasion a more searching inquiry into whether the laws of the State provided adequate practical protection to the interests of defendants whose culpability was impaired by serious mental disabilities. Part of that inquiry might include judicial exploration of the actual level of availability of *mens rea* defenses in criminal trials in the State.[37]

To deny defendants with mental disabilities an opportunity to explain their disabilities' relevance imposes a draconian regime of conviction without personal culpability—essentially strict liability—and does so without any of the justifications generally offered for strict liability in those areas of law where it is tolerated. There is no justification in our historical traditions, or in contemporary principles of fundamental fairness, that would warrant such a result.

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[36] This would obviously protect the vast majority of the States today, since almost all have adopted either the Model Penal Code approach or a formulation of the *M'Naghten* test that includes its basic contours. Similarly, it would encompass the formulation of *M'Naghten* codified in the federal Insanity Defense Reform Act of 1984, 18 U.S.C. § 17 (1984). It would also protect States that adopt the basic principles of the insanity defense but change its terminology. *See, e.g., Pouncey v. State*, 465 A.2d 475 (Md. 1983).

[37] *See generally* Peter Heinbecker, *Two Years' Experience under Utah's Mens Rea Insanity Law*, 14 Bull. Am. Acad. Psychiatry & L. 185, 190 (1986) (suggesting the importance, in the initial experience under the statute, of bargaining for insanity pleas); Henry J. Steadman, Margaret A. McGreevy et al., *The Impact of Abolishing the Insanity Defense in Montana*, in *Before and After Hinckley: Evaluating Insanity Defense Reform* 121-37 (1993).

CONCLUSION

For the foregoing reasons, *amici* urge that the judgment of the Arizona Court of Appeals be reversed.

Respectfully submitted,

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APPENDIX

The American Association on Mental Retardation ("AAMR") is the nation's oldest and largest interdisciplinary organization of professionals and other persons who work exclusively in the field of mental retardation. AAMR promotes progressive policies, sound research, effective practices, and human rights for people with intellectual disabilities.

The Arc of the United States (formerly known as the Association for Retarded Citizens of the United States), through its 875 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and their families.

The National Disability Rights Network ("NDRN"), formerly the National Association of Protection and Advocacy Systems ("NAPAS"), is the membership association of protection and advocacy ("P&A") agencies which are located in all 50 states, the District of Columbia, Puerto Rico, and the territories (the Virgin Islands, Guam, American Samoa and the Northern Marianas Islands). P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. In fiscal year 2004, P&As served over 76,000 persons with disabilities through individual case representation and systemic advocacy. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities.

The Bazelon Center for Mental Health Law is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. The Bazelon Center has engaged in litigation, administrative advocacy, and public education to promote equal opportunities for individuals with mental disabilities. Much of the Center's

work involves efforts to remedy disability-based discrimination through enforcement of the Americans with Disabilities Act.